Supreme Court, U. S.
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No. 73-1123

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH FEOLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondent suggests (Memo. in Opp., p. 3) that the United States is estopped from challenging the *Crimmins* doctrine because it did not seek rehearing in the court of appeals of the reversal of petitioner's conspiracy conviction.

The government did not ask the Court of Appeals for the Second Circuit to reconsider *Crimmins* because it would have been futile to do so. Every active judge in that Circuit (except Chief Judge Kaufman) had previously (and recently) voted in support of the *Crimmins* rule. *United States* v. *Alsondo,* (Pet. App. A) (Friendly, Feinberg, Mansfield, JJ.); *United States* v. *Vilhotti,* 452 F. 2d 1186, 1189 (Moore, Hays, Mulligan, JJ.); *United States* v. *Fields,* 466 F. 2d 119, 121 (Feinberg, Mulligan, Oakes, JJ.); *United States* v. *Jacobs,* 475 F. 2d 270, 282 (Friendly, Oakes, Timbers, JJ.). Moreover, since the decision below, the judges of that Circuit((including Judge Kaufman)

have continued to support the *Crimmins* rule. *United States* v. *Houle and Diodato*, 490 F. 2d 167 (Kaufman, Smith, Oakes, JJ.); *United States* v. *Cangiano*, No. 72-1120, decided January 11, 1974 (Mulligan, Oakes, Timbers, JJ.); *United States* v. *DeMarco*, 488 F. 2d 828 (Kaufman, Smith, Oakes, JJ.).

Moreover it is not true that the government "voluntarily acquiesed in, ratified and recognized the validity of the *Crimmins* doctrine * * *" (Memo. in Opp., p. 3). In its petition for rehearing the government said (Petition for Rehearing, pp. 1-2, n. *):

> The Government continues to oppose the extension of the "traffic light" doctrine of *United States* v. *Crimmins*, 123 F. 2d 271 (2d Cir. 1941) to cases in which, as here, the federal interest arises not out of some aspect of the prohibited act, but out of the identity of the object of the conspirators' criminal design.
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> * * *
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> However, because we believe that the consideration of this issue in [sic] a matter for the Court *in banc*, and because rehearing *in banc* is not being sought in this case, we do not ask the Court to reconsider its reversal of the conspiracy convictions.[1]

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[1]We note that in *United States* v. *Hickman*, 487 F. 2d 1404, petition for writ of ceritorari pending, No. 73-6009, the Seventh Circuit ordered that its earlier unpublished opinion in *United States* v. *Poleski* be published (See Pet. 8, n. 8). The case is now reported at 489 F. 2d 822.

It is repectfully submitted that the United States is not estopped from asking this Court to consider the continued validity of the *Crimmins* rule.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.